Völkerrechtsblog
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DISCUSSION RESPONSE

A Response to "Which Rights to enforce in Time of Public Emergency?"

GLORIA GAGGIOLI — 8 June, 2016

A response to Cilem Şimşek

The interplay between human rights law (HRL) and international humanitarian law (IHL) is one of the most difficult and fascinating topics of international law. The blog by Cilem Şimşek attempts to put in perspective the evolution of this interplay with a focus on the practice of the European Court of Human Rights. **Three key themes** are developed. Each of them gives rise to diverging interpretations as will be demonstrated by the following response.

1) The origins of the interplay between IHL and HRL.

While it seems obvious today that IHL and HRL overlap in armed conflict situations, this understanding is actually not so ancient and does not belong to a « traditional view ». It is submitted that when human rights law emerged at the international level with the United Nations Charter, they were seen as applying essentially in peacetime. No one had in mind armed conflict situations when the Universal Declaration of Human Rights was adopted. Traditionally, the prevailing view was that armed conflicts were governed by "the law of armed conflicts" while human rights law would be dealing with peacetime. When derogation clauses were included in human rights treaties, the assumption was that only non-derogable rights would remain in armed conflict situations. On the other hand, IHL was seen essentially as dealing with international armed conflicts, with the exception of common article 3 to the Geneva Convention (which contains obligations that are akin to the non-derogable rights to be found in human rights treaties). The overlap was thus seen as minimal at the time. Meyrowitz provides a very good example of what was the main trend in the 1950s. It is only in the late 1960's that this understanding evolved, notably due to the multiplication of non-international armed conflicts in the Cold War context and the need for norms to cover such conflicts. The 1968 Teheran Conference marks a turning point in that regard. For the first time, the UN referred to "human rights in armed conflicts". This led to an ever-expanding interpretation of the role of human rights law in armed conflicts by the UN and human rights bodies, as well as to the development of IHL for non-international armed conflicts through the adoption of Additional Protocol II to the Geneva Conventions.

2) The different approaches and the meaning of the *lex specialis*

The different approaches regarding the interplay between IHL and HRL have indeed often been described as divided between the separatist, complementarist and integrationist approaches. Interestingly enough, the author of the blog adds the "lex specialis position" of the ICJ as an additional approach. It is submitted though that the *lex specialis* maxim highlighted by the ICJ is not as such an additional approach to the interplay between IHL and HRL. Actually, depending on how the "lex specialis" maxim is understood, it might either fit into the separatist or the complementarist approach. Some – including States like the United States of America and Israel – have interpreted the *lex specialis* notion as meaning that, in armed conflict situations, IHL derogates from HRL as a whole. This interpretation has the effect of excluding – or at least severely diminishing – the relevance of human rights law in armed conflicts. To that extent, the l*ex specialis* is used as one of the main legal rationale for maintaining a clear-cut separation between IHL and HRL (separatist theory). This interpretation is erroneous though and does not correspond to the ICJ understanding of the *lex specialis*. For instance, in the Advisory Opinion on the Wall in the Occupied Palestinian Territory, the ICJ clearly applied both IHL and HRL; thus demonstrating that the *lex specialis* does not result in mutual exclusiveness. At the level of legal regimes, IHL could only be a *lex specialis* in a somewhat improper sense in order to designate the fact that IHL is a body of law specifically dealing with armed conflicts which may thus *complement* the general protection offered by HRL. The *lex specialis* thus becomes a complementarity tool to coordinate the two levels of protection of HRL and of IHL. The practice of international bodies definitely goes in that

direction, as demonstrated for instance by General Comment n° 31 of the Human Rights Committee in paragraph 11.

3) The approach taken by the European Court of Human Rights (ECtHR)

The author of the blog holds that in cases dealing with armed conflict situations, the ECtHR addressed the interplay between IHL and HRL through the derogation mechanism to be found in article 15 of the European Convention. Actually, this never happened. There is a very simple reason for this. In those cases, States did not derogate.

In the Russian and Turkish cases, the Court did *not* apply IHL (at least explicitly). In the *Isayeva case*, the Court maintained that the operation at stake had "to be judged against a normal legal background" (§191). The prudence of the European Court vis-à-vis IHL in those cases is certainly due to the fact that Russia and Turkey did never recognize the existence of an armed conflict on their soil. Understandably, the Court thus took them at their word and decided to maintain the "normal background"-fiction in order to apply the more protective regime of HRL.

In more recent cases pertaining to recognized international armed conflicts, the Court did refer to IHL, but again, it did *not* do so through the derogation mechanism. For instance, in the *Hassan case*, the Court granted a decisive importance to IHL by considering that the internments performed by the UK in the context of the occupation in Iraq were not contrary to the European Convention despite the fact that 1) article 5 of the European Convention does not allow for administrative detention even in armed conflicts and 2) that UK did not derogate from this article 5. Even if in actual facts the European Court gave somehow precedence to IHL, it did

not present its finding as an application of the "*lex specialis derogat legi generali*" maxim, but rather as the result of an interpretive exercise giving due weight to the rules to be found in article 31§3 b) and c) of the Vienna Convention on the Law of Treaties. In particular, for the Court, State practice (which consists in not derogating from the ECHR to detain in accordance with IHL) modified article 5 of the ECHR (§101). The Court also highlighted that human rights obligations have to be interpreted "in harmony" with IHL (§102). States would therefore not be required to derogate from the ECHR in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. The Court made clear though that this reasoning could only be applied in international armed conflicts. (§104).

In brief, the European Court has indeed increasingly taken into account IHL – not through derogations – but through interpretation in an attempt to coordinate or harmonize the two legal regimes. This is nothing more than a modern and enhanced version of the complementarist approach.

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